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IN THE
Supreme Court of the United States

October Term, 1941

THE CITY OF INDIANAPOLIS, et al., <i>Petitioners,</i>	}	Nos. 10 and 11.
<i>v.</i>		
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., et al., <i>Respondents.</i>		
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., <i>Cross-Petitioner,</i>	}	Nos. 12 and 13.
<i>v.</i>		
CITIZENS GAS COMPANY OF INDIANAPOLIS, et al., <i>Respondents.</i>		

**REPLY BRIEF OF CITY OF INDIANAPOLIS TO
REJOINDER BRIEF OF CHASE NATIONAL BANK
AND SUPPLEMENTAL ANSWER BRIEF OF
INDIANAPOLIS GAS COMPANY**

Respondent and cross-petitioner Chase in its rejoinder brief at page 6 says that:

“The argument (Supp. Mem. 6-8) that the Lease itself was prohibited by Sections 85 and 254 of Chapter 129 of the Acts of 1905 (quoted, Pl. Br. 147-9) is absurd. These statutes obviously relate solely to contracts to which a municipality is a party and the City was not a party to the contract here in question.”

Chase thus claims that Sections 85 and 254 of Chapter 129 of the Acts of 1905 are inapplicable as limiting the duration of a contract with the City because the City did not execute the lease. Chase thus admits that there was no initial liability on the City in respect of the obligations of the lease.

The above named statutes, however, are applicable whenever any attempt is made to bind the City at any time. The obvious purpose of these acts and wise public policy which caused their enactment cannot be evaded by first executing a contract to which the City is not a party and then at some subsequent time seeking to make the City liable thereunder. The language of the Acts is all embracing and condemns any contract in violation of the prohibition therein contained whenever and however made so long as the City is sought to be held liable thereunder.

Indianapolis Gas, in its Supplemental Answer Brief, claims at page 9 that Sections 85 and 254 of Chapter 129 of the Acts of 1905, were repealed. Indianapolis Gas says:

“So far, if at all, as Chapter 129, Acts Indiana 1905, sections 85 and 254, were in conflict with the Public Service Commission Act they were repealed by the last section (130) of Chapter 76, Acts 1913 (Appendix L), which expressly repealed all prior legislation ‘so far as inconsistent therewith.’ This included repeal of all statutes (if any) which forbade the execution of this lease ‘at a price and on terms fixed by the Commission.’ ”

Section 130 of Chapter 76, Acts of 1913, did not repeal Sections 85 and 254, Chapter 129, of the Acts of 1905 because Sections 85 and 254 are not inconsistent with the

provisions of Chapter 76 (Shively-Spencer Act) of the Acts of 1913.

Section 130 of Chapter 76, Acts of 1913 (p. 214) does not enumerate the Acts or parts of Acts repealed, but simply repeals all Acts and parts of Acts conflicting with the provisions of Chapter 76 so far as they are inconsistent with the provisions of said Chapter 76.

It is not claimed by Indianapolis Gas that Chapter 76 of the Acts of 1913 expressly repealed either of Sections 85 or 254 of the Acts of 1905.

Repeals by implication are not favored by Indiana courts.

Robinson v. Rippey (1887), 111 Ind. 112;

City of Indianapolis v. Morris (1900), 25 Ind. App. 409.

The purpose of the Shively-Spencer Act and these two sections of the Cities and Towns Act of 1905 are essentially different in that the Shively-Spencer Act with certain exceptions was not intended to regulate municipally owned utilities; whereas, the Cities and Towns Act was intended in part to prevent the imposition of onerous contracts on municipally owned utilities which would result in burden to the taxpayers.

This situation is emphasized in this case when we consider that the Act of 1933 (Chapter 190) exempts the City of Indianapolis in respect of this utility from all control by the Public Service Commission; and that while the express point here involved was not before the Indiana Supreme Court in *Hamer v. City of Huntington* (1939), 215 Ind. 594, the Court dealt with Section 85 of the Acts of 1905 and

recognized the efficacy of this statute. In that case it was held that a contract entered into on December 31, 1936, was absolutely void because no appropriation of funds had been made prior to the execution of the contract in violation of the provisions of said Section 85. Section 85 refers to Section 254 and the two statutes stand together.

Chase, in its brief, page 2, quotes an alleged admission of the City (I R. 243) :

“that defendant Citizens Gas Company of Indianapolis conveyed and transferred all of its property to the City of Indianapolis subject to all outstanding legal obligations of that Company, * * *”

In order to make what Chase now says is its main point, it takes a position not borne out by the record. A reference to the sentences in the record immediately following the quoted portion set out by Chase, show the unfairness of Chase's position. The portion quoted by Chase, together with the clauses and phrases immediately following the quoted portion and omitted by Chase, are herewith set out (the italicized portion was omitted by Chase) :

“that defendant Citizens Gas Company of Indianapolis conveyed and transferred all of its property to the City of Indianapolis subject to all outstanding legal obligations of that Company, *but they aver that said lease was not and is not one of such obligations; and they aver that the tendered assignment of said lease was expressly rejected by the City of Indianapolis, that said lease was not assumed by the City, and is wholly invalid and unenforceable as against defendant City of Indianapolis*” (I R. 243).

Chase also in its brief at page 3 quotes a portion of the City's answer and counter claim in respect of certain averments in respect of the existing controversy and states that the quoted extract establishes “that Citizens Gas had power

to execute the lease and make it binding on the public charitable trust."

We set out below the relevant portion of the answer and counter claim and have italicized the portions omitted by Chase in its quotation:

"These answering defendants admit that a real and actual controversy exists as to the binding force and effect of said lease of September 30, 1913, but they allege:

(b) That such controversy exists only as to the binding force and effect of said lease of September 30, 1913, upon these answering defendants after the transfer of the property and assets formerly held by the Citizens Gas Company as Trustee of a public charitable trust to the City of Indianapolis as the successor Trustee of said trust, which transfer was made on September 9, 1935, and allege that as to these defendants, no controversy ever existed as to the binding force and effect of said lease for and during the term of trusteeship of said Citizens Gas Company." (I R. 243.)

A cursory examination of the quoted language completely refutes the claim of Chase of any admission of liability under the lease. The City was here only dealing with the question of when the controversy arose. It is significant to remember that the quoted portion is a part of an answer and counter claim in which the City sought a declaratory judgment that the lease was unenforceable as to it.

In its rejoinder brief at page 3 Chase quotes one question and answer from a colloquy between Mr. Justice Reed and counsel for the City.

We have had no experience with the practice of quoting colloquies occurring at a former argument, but if any weight is to be given to such a colloquy, then the full discussion

relating to the subject-matter should be set forth. This, we have done in an appendix to this brief, the transcript having been furnished us by Chase's counsel. An examination of this discussion will serve to show that in the colloquy in its entirety the position of the City was then as expressed in its brief and as it has been throughout this controversy. To quote half sentences, or isolated statements, and torture a construction from them not warranted by the full text, is to give rise to confusion and unfairness to one's opponents.

Respectfully submitted,

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APPENDIX A

MR. JUSTICE REED: The City entered into possession?

MR. THOMPSON: The City entered into possession under the terms of the standstill *bill* (agreement). We faced this situation, if the Court please. There were 50,000 consumers on the lines of the Indianapolis Gas Company. We called the attention of the Gas Company to the fact the public interest demanded that that service should not be interrupted. We offered to pay (in connection with) the take-over on December (September) 9, 1935, interest due October 1. We offered to pay the \$171,000 of interest, provided they would agree that the payment of that money, and the use of this property, should not constitute an admission on our part that the lease was valid, or an admission on their part that the lease was invalid. On December (September) 30, our offer was accepted, and then on March 2, 1938, that agreement was continued until the question of enforceability of this lease against the City should be finally determined; so that our occupation of this property has not been on the theory that we were bound by the lease, but it has been under an agreement with the Indianapolis Gas Company that our occupancy should not affect us in this litigation.

MR. JUSTICE REED: Mr. Thompson, as I understand the record, there has (had) been some arrangement made prior to the actual deeding by the Citizens to the City of Indianapolis of this property. The City had passed a resolution which they carried out, providing for taking over the property of the Citizens.

MR. THOMPSON: That is true.

MR. JUSTICE REED: Do you claim there was any refusal to take this lease prior to the actual presentation?

MR. THOMPSON: No. I claim the resolution of 1929 adopted by the Board of Public Works simply was a general resolution to take over that property which constituted the trust res. In that connection, I must call Your Honor's attention to the fact that this Charitable Trust was created in 1908. No part of the property of the Indianapolis Gas Company, and no lease on that property, was a part of the original trust lease (res). The lease was not executed until five years later, in 1913, so that it is our contention that when we adopted a resolution to take over the property of this trust—and that resolution indicates that it is the property that is coming to us under this arrangement—we were not obligated and did not intend to take over a lease which the initial trustee had no power to execute.

MR. JUSTICE REED: In that resolution you did not eliminate the lease you were going to take over?

MR. THOMPSON: Nor did we say it was included.

MR. JUSTICE REED: As I understand the lease, it took over whatever property belonged to the trustee.

MR. THOMPSON: That is right.

MR. JUSTICE REED: We have here, then, at least as one phase of it, to determine whether or not this lease became a part of the property of the corporate trustee.

MR. THOMPSON: Your statement is entirely correct. If it did, we are obligated by its terms. If it did not, we are not obligated by it.

MR. JUSTICE REED: And you take the position that the corporate trustee had no right to take over this lease of the Indianapolis (Gas)?

MR. THOMPSON: I do.